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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LA COSTA BEACH HOMEOWNERS' ASSOCIATION, a California Corporation, RICHARD ZIMAN, an individual, DAPHNA ZIMAN, an individual, ART ZOLOTH, an individual, HELEN ZOLOTH, an individual, FREDDIE FIELDS, an individual, CORINNA FIELDS, an individual, PEG YORKIN, an individual, BUDGE OFFER, an individual, JERRY MONKARSH, an individual, VIRGINIA MANCINI, an individual, RYAN O'NEAL, an individual, AARON SPELLING, an individual, CANDY SPELLING, an individual, NANCY HAYES, an individual, and LOU ADLER, an individual,

Petitioners,

v.

CALIFORNIA STATE COASTAL CONSERVANCY, a California state agency, and DOES 1 through 50, inclusive,

Respondents.

GAMMA FAMILY TRUST, BROAD REVOCABLE TRUST and NANCY M. DALY LIVING TRUST,

Real Parties-in-Interest.

Case No. BS063275

PETITIONERS' CONSOLIDATED OPPOSITION BRIEF TO RESPONDENT'S MOTION TO STRIKE AND DEMURRER

[The Honorable Dzintra Janavs]

Date: October 5, 2000
Time: 9:30 a.m.
Department: 85

[Filed concurrently with Objection to Request for Judicial Notice]

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I. INTRODUCTION

This action involves decisions by the California Coastal Commission[1] ("Commission") and the State Coastal Conservancy (the "Conservancy") to require the Gamma Family Trust, Broad Revocable Trust and Nancy M. Daly Living Trust ("Real Parties") to provide offsite beach access in order to build homes in Malibu, without adequately taking into account the unmitigated impacts of the required public beach access on public safety. (Petition, ¶ 6). Specifically, the Commission required the Real Parties to buy and dedicate to the Conservancy, for public view and beach access purposes, an off-site lot on La Costa Beach in an extremely dangerous stretch of Pacific Coast Highway located at 21704 Pacific Coast Highway, Malibu (the "Lot"). (Id., ¶ 6-8). Neither the Commission nor the Conservancy studied or addressed the public safety issues involved with providing public beach access through the Lot. (Id., ¶ 6-14). Despite evidence that the portion of La Costa Beach at issue is completely unsafe and unsuitable for public beach access, at a public hearing held on April 27, 2000, in Sacramento the Conservancy voted to accept the dedication of the Lot. (Id., ¶ 12-14).

II. SUMMARY OF ARGUMENT

The Petitioners have filed a detailed verified petition challenging the Conservancy's April 27, 2000 action to accept the dedication of the Lot. The petition adequately states claims under the Coastal Act, the State Coastal Conservancy's enabling statute, and the California Environmental Quality Act and seeks both a peremptory writ and, if necessary, a provisional remedy to maintain the status quo pending the hearing on the writ.

The Conservancy argues, without any support, that its actions are not reviewable by administrative mandamus, that its actions are not reviewable under the Coastal Act and that its decision was exempt from CEQA. In fact, in this matter the Conservancy held a quasi-judicial hearing, took testimony and made factual findings specific to the property in question and is properly subject to administrative mandamus. Moreover, the distinction between administrative mandamus and ordinary mandamus would not defeat the petition even if relevant, and, in fact, the petition states

[1] The Petitioners have filed a concurrent action against the Commission entitled La Costa Beach Homeowners' Association et al. v. California Coastal Commission, Los Angeles Superior Court Case No. BS063276, which is also pending.

an adequate claim for either traditional or administrative mandamus.

Furthermore, the statutory scheme which creates the Conservancy makes it clear that the Conservancy's actions are governed, in part, by the Coastal Act. Finally, the Conservancy is clearly subject to CEQA, and the CEQA arguments raised in the demurrer raise questions of fact not properly before the Court.

The Conservancy seeks to have this Court decide the merits of this case prior to a hearing on the merits and without the preparation of an adequate record for judicial review. The claims raised in the motion to strike and the demurrer go well beyond the allegations of the pleadings and attempt to argue many factual issues not properly the subject of demurrer. In addition, the Conservancy raises for the first time arguments which are not found in the record of the Conservancy's decision which is the subject of this action. The motion to strike and demurrer must be overruled, and the merits of Petitioners' claims must be decided after proper briefing on the merits with reference to the full record.

III. LEGAL STANDARDS FOR A MOTION TO STRIKE AND DEMURRER.[2]

The legal standards for motions to strike and demurrers are similar. A motion to strike is appropriate to strike out any irrelevant, false, or improper matter inserted in any pleading or to strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. Cal. Civ. Pro. Code § 436. A demurrer is used to dispose of a pleading where it fails to state facts sufficient to constitute a cause of action. Cal. Civ. Pro. Code § 430.10.

In considering both a motion to strike and a demurrer, the pleading must be liberally construed in favor of the pleader. Cal. Civ. Pro. Code § 452. Moreover, in order to prevail on a motion to strike or demurrer, the defect must appear ***on the face*** of the challenged pleading or from any matter of which the court is required to take judicial notice.[3] . Cal. Civ. Pro. Code § 437 (motion

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[2] Because the legal standards of review for the Conservancy's motion to strike and demurrer are very similar and because the Conservancy makes similar arguments in its motion to strike and demurrer, the Petitioners believe that a single consolidated opposition brief is appropriate and efficient in these circumstances.

[3] By its request for judicial notice, the Conservancy improperly seeks to try this case on demurrer. Its request is objectionable for many reasons (see separate objections filed concurrently herewith), not the least of which is that the Conservancy is seeking to have this Court improperly

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to strike); Blank v. Kirwan, 39 Cal. 3d 311, 318 (1985) (demurrer).

"[A] motion to strike is generally used to reach defects in a pleading which are not subject to demurrer." Pierson v. Sharp Memorial Hospital, Inc., 216 Cal.App.3d 340, 342 (1989). "A motion to strike does not lie to attack a complaint for insufficiency of allegations to justify relief; that is a ground for general demurrer." Pierson, 216 Cal.App.3d at 342.

The party demurring must admit the truth of all material facts that are properly pled, no matter how unlikely it contends those facts are. See Serrano v. Priest, 5 Cal. 3d 584, 591 (1971); Del E. Webb Corp. v. Structural Materials Co., 123 Cal. App. 3d 593, 604 (1981). Whether Petitioners can prove the assertions made in the pleadings is irrelevant to the court's consideration when ruling on a demurrer. See Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 213-14 (1983).

IV. THE MOTION TO STRIKE SHOULD BE DENIED BECAUSE PETITIONERS HAVE PROPERLY PROCEEDED UNDER CCP §1094.5

The Conservancy's motion to strike is based exclusively on the grounds that it was acting in a quasi-legislative capacity, not a quasi-judicial one, and so its conduct can be reviewed only by traditional and not administrative mandate. This argument is contradicted by the allegations of the petition, the applicable statutes and regulations, and by enunciated public policy.

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A. The Conservancy Acted In A Quasi-Judicial Capacity, So Its Actions Are Properly Reviewable By Administrative Mandamus Under CCP §1094.5.

The Conservancy does not deny that administrative mandate is the proper vehicle for review of quasi-judicial actions. Friends of Old Trees v. California Department of Forestry and Fire

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judicially notice not only that certain documents exist (like the Commission reports), but also judicially notice that what these documents contain is actually true. The Court may be able to judicially notice that documents exist or events occurred, but cannot judicially notice the truth or substance of documents or testimony. AI Holding Co. v. O'Brien & Hicks, Inc., 75 Cal. App. 4th 1310, 1312 (1999) (it is proper for a trial court in ruling upon a demurrer to consider facts of which it has taken judicial notice, including the existence of a document, but *not* the truthfulness or proper interpretation of the contents of the document) citing StorMedia Inc. v. Superior Court, 20 Cal. 4th 449, 457, fn. 9 (1999).

Protection, 52 Cal.App.4th 1383, 1389-90 (1997); Stanislaus Heritage Development Project v. County of Stanislaus, 48 Cal.App.4th 182, 191 (1996). It merely asserts that the actions alleged in the petition are quasi-legislative, not quasi-judicial. (Motion, 4:17-18). The Conservancy is wrong on the facts and wrong on the law.

"Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory [judicial] act involves the actual application of such a rule to a specific set of existing facts." Dominey v. Department of Personnel Administration, 205 Cal.App.3d 729, 736 (1988) citing Strumsky v. San Diego Cty. Employees Retirement Assn, 11 Cal.3d 28, 35 (1974). "Quasi-legislative acts involve the adoption of rules of general application on the basis of broad public policy, while quasi-judicial acts involve the determination and application of facts peculiar to an individual case." Beck Development v. Southern Pacific Transportation Co., 44 Cal.App.4th 1160, 1188 (1996). "The classification of administrative action as quasi-legislative or quasi-adjudicative 'contemplates the function performed . . . [a]nd . . . only the function performed." 20 Century Insurance Company v. Garamendi, 8 Cal.4th 216, 275 (1994).

The Conservancy argues that it always acts in a quasi-legislative capacity because it never acts as a fact-finder or involves itself in questions involving individual rights. Nor, argues the Conservancy, is it required to conduct evidentiary hearings. Indeed, according the Conservancy, the only decisions the Conservancy is ever called upon to make are policy-related or community-wide decisions regarding public access to beaches. (Motion, pp. 4-5).

Unfortunately for the Conservancy, the allegations of the petition, which must be accepted as true for the purposes of this motion, belie the Conservancy's arguments that they are not required to hold hearings, do not act as fact-finders or engage in specific rights determinations.

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1. Petitioners Have Alleged Facts Showing That The Conservancy Acted As A Fact-Finder And Engaged In The Determination Of Specific Rights Based On Preexisting Facts.

On April 27, 2000, the Conservancy noticed and held a hearing in order to consider the acceptance of the dedication of 21704 Pacific Coast Highway, Malibu, California as an off-site

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mitigation measure for Real Parties' development permits. At that hearing evidence was heard and taken on issues including, but not limited to, whether the acceptance of the dedication by the Conservancy was consistent with the Coastal Act, the Conservancy's enabling legislation and interim guidelines. The hearing primarily involved the ***factual question*** of whether the provision of public access at this location was appropriate.

In order to be consistent with the Coastal Act and Conservancy's enabling legislation, the Conservancy had to make the ***factual determination*** that this specific Lot, 21704 Pacific Coast Highway, Malibu, California, and its specific geographical and topographical characteristics were consistent with the Conservancy's mandate to provide ***safe*** beach access to the community.

The Conservancy Staff Report for April 27, 2000 makes several recommendations, including but not limited to, that the Conservancy make ***factual findings*** that the dedicated parcel provides visual and public access to La Costa Beach in satisfaction of the Commission's permit amendments and that the proposed dedication was consistent with the Coastal Act, Conservancy's enabling legislation and interim guidelines. Moreover, the Conservancy also accepted testimony and evidence at its April 27, 2000 regarding these findings.

Looking "only to the function performed" by the Conservancy to determine whether the Conservancy acted to promote the "adoption of rules of general application on the basis of broad public policy" or whether it proceeded to make a decision concerning "acts involv[ing] the determination and application of facts peculiar to an individual case," it is clear from the facts as alleged that the Conservancy was acting in a quasi-judicial role, and hence its actions are reviewable under §1094.5.

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2. The Conservancy Was Required To Hold A Due Process Hearing.

The Conservancy makes much of the fact that its acts must be quasi-legislative because it was not required by statute to have a hearing at which evidence is accepted and findings of fact are made. (Motion, p.3, 5-6; Demurrer, p. 7). The Conservancy cites no law for the proposition that it is not required to have such a hearing, but rather argues that its enabling legislation merely "provides policies and goals, but [no] blueprint" or "procedural requirements, such as hearings, to effectuate

the Conservancy's program." (Motion, p. 3). Prominent by its absence is any citation to legal authority for these claims.

The Conservancy asserts, alternatively, that, because no hearing was required, its actions were quasi-legislative and the April 27, 2000 hearing is irrelevant to the determination of whether its acts were quasi-legislative. In fact, the Conservancy's acts were quasi-judicial and, therefore, it was required to have the April 27, 2000 hearing, otherwise the Conservancy would not have met its ***due process*** obligations.

The Conservancy argues that when the Legislature created the Conservancy it provided statutory goals and policies, see Cal. Pub. Res. Code §§ 31104.1, 31105 and 30154, but the Legislature did not mandate any procedures, such as hearings, by which the Conservancy was to execute its statutory goals. (Motion, p. 3). The Conservancy surmises that because the Legislature did not expressly impose the obligation to hold hearings on the Conservancy, the Conservancy's actions must be quasi-legislative. (Id.)

However, the fact that the Legislature did not expressly mandate formal hearings by the Conservancy is not determinative of whether such hearing are necessary. Constitutional due process, which the Legislature cannot legislate around, requires a hearing where the conduct is quasi-adjudicatory. "Quasi-legislative acts are not subject to procedural due process requirements while those requirements apply to quasi-judicial acts regardless of the guise they may take . . . [w]hen a quasi-judicial action is to be taken, procedures must be available to provide, at a minimum, notice and an opportunity for a hearing." Beck Development v. Southern Pacific Transportation Co., 44 Cal.App.4th 1160, 1188 (1996).

Thus, the inquiry is not whether the Legislature expressly required the Conservancy to have hearings, but whether the Conservancy ***acting in this case*** acted in a quasi-adjudicatory manner. An administrative agency can be quasi-legislative but also act in a quasi-adjudicative manner. As discussed above, in this case the Conservancy ***performed the function of a fact-finder*** in determining the suitability of the Lot for the uses for which it was dedicated. In other words, the Conservancy applied its judgment to a particular, existing, set of circumstances and facts in order to make factual determinations regarding the use of the Lot for public beach access.

Nor can the Conservancy rely upon Joint Council of Interns & Residents v. Board of Supervisors, 210 Cal.App.3d 1202 (1989), to assist the Conservancy in its arguments. In Joint Council the Los Angeles Board of Supervisors voted to implement a pilot program allowing an independent contractor to take on County functions. First and foremost, in Joint Council the determination of whether the Board acted quasi-legislatively or quasi-judicially was made during the writ trial proceeding, not at the demurrer or motion to strike level. Joint Council, 210 Cal.App.3d at 1208-1209. Joint Council states the principle "that a legislative act generally predetermines what the rules shall be for the regulation of future cases falling under its provisions, while an adjudicatory act applies law to determine specific rights based upon specific facts ascertained from evidence adduced at a hearing." Id. at 1209-1210.

The Joint Council court then painstakingly reviewed the facts of the Board hearing to determine that the contract award was quasi-legislative in character. In fact, Joint Council supports Petitioners' position that factual review of the function performed is necessary to determine whether an action is quasi-judicial or legislative in character.

B. Petitioners Have Pleaded All The Elements Of A Claim For Traditional Mandate.

The Conservancy's argument should be rejected because its attempted distinction between traditional and administrative mandate elevates form over substance, contrary to the repeated acknowledgments by the courts that there is no practical or relevant difference between the two.[4] Cadiz Land Company v. Rail Cycle, L.P., 99 Cal.Rptr.2d 378, 412 (August 18, 2000) (distinction between traditional mandamus quasi-legislative action and administrative mandamus quasi-judicial action is "a distinction without a difference"); Friends of Old Trees, supra, 52 Cal.App.4th at 1389 ("[t]here is no practical difference between the standards of review applied under traditional or administrative mandamus . . . [t]he remedies available remain the same"); Stanislaus, supra, 48 Cal.App.4th at 192 ("[t]he distinction [between traditional and administrative mandamus]. . ., is rarely significant"); Kuhn v. Department of General Services, 22 Cal.App.4th 1627, 1641 (1994)

[4] In addition, state agencies may be vested with and can concurrently exercise both quasi-legislative and quasi-adjudicatory powers in the same proceeding. United States v. California State Water Board, 182 Cal.App.3d 82, 112-114 (1986) ("the Board's exercise of authority involved both quasi-legislative and quasi- judicial functions").

("we need not consider [the] argument that review . . . should have been by traditional mandamus rather than administrative mandamus because no hearing was required by law . . . where the result is affected not a jot by the distinction between the two standards of review, 'the argument leads nowhere'").

Even if there were a relevant difference at the pleading stage between traditional and administrative mandate, and even if the Conservancy were right that its actions are reviewable only under §1085, both of which Petitioners vigorously deny, the demurrer and motion to strike should still be denied. It is axiomatic that the courts look beyond how a pleadings or a cause of action is titled to determine the sufficiency of the pleading. "In considering the sufficiency of a complaint, the court is not concerned with the question of proper designation of the action, nor with the prayer for relief. The duty devolving upon the court is that of determining from its allegations whether the complaint states any cause of action entitling plaintiff to any relief at law or in equity . . . the court has jurisdiction to grant any relief consistent with the case made by the complaint and embraced within the issue. Zumwalt v. Hargrave 71 Cal.App.2d 415, 417 (1945) citing Hayden v. Collins, 1 Cal.App. 259, Keele v. Clouser, 92 Cal.App. 526 and Luckey v. Superior Court, 209 Cal. 360.

Regardless of the labels on the petition, Petitioners have pleaded sufficient facts to constitute valid claims for traditional mandate. The necessary allegations to invoke traditional mandamus are that an administrative agency acted in a manner wherein it did not perform some mandated act, where no adjudicative hearing was required. Cal. Civ. Pro. Code § 1085; see Motors Insurance Corporation v. Division of Fair Employment Practices, 118 Cal. App.3d 209 (1981) and Wilson v. Hidden Valley Water District, 256 Cal.App.2d 271 (1968).

The writ herein pled that the Conservancy was an agency created by the State of California, (Petition, ¶ 3, 24 and 32), statutorily charged with implementing and providing safe public beach, (Petition, ¶ 17, 24-26, 34, 40 and 42), and that the Conservancy acted in violation of its mandate or outside its jurisdiction in accepting the dedication of the Lot because it created an unsafe public beach access. (Petition, ¶ 12-17, 19, 24-26, 34, 40 and 42). Thus, Petitioners have properly pled traditional mandamus.

In addition, the court can always issue the proper writ, no matter what has been pled.

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Mahdavi v. Fair Employment Practices Commission, 67 Cal.App.3d 326, 336 (1997) (court should issue traditional mandamus even if only administrative mandamus is pled because court will look to substance of pleading).

For all of these reasons, the Conservancy's arguments based on the purported distinction between traditional and administrative mandate should be rejected.

V. THE DEMURRER SHOULD BE OVERRULED

A. Petitioners Have Stated A Valid Cause Of Action For Violation Of The Coastal Act.

The Conservancy demurs to Petitioners' first cause of action under the Coastal Act. As in its motion to strike, the Conservancy maintains that the Conservancy does not act as a fact-finder in deciding whether a particular project or action is in compliance with the Coastal Act. However, as discussed above, the Conservancy did act as a fact-finder in this case, and it made findings regarding the consistency of the proposed dedication with the Coastal Act.

The Conservancy seeks to obscure its obligations and role under the Coastal Act in the actions it undertook in this case with a long discussion about whether the Conservancy has the power to make decisions regarding the funding or nonfunding of certain public beach access projects. Having asserted that the Legislature has given it complete discretion in such funding decisions, the Conservancy argues that any review of its actions would "usurp" its Legislature-granted authority to fund or not fund projects. The Conservancy then summarily and nonsensically argues that the Court cannot review the Conservancy's decision to determine if it acted consistently with its enabling legislation.

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Similarly, the Conservancy seeks to portray itself as the passive receptacle of the Commission's actions and resolutions. The Conservancy appears to be arguing that once the Commission has reached a decision or made findings regarding the consistency of some project with the Coastal Act, the Conservancy must accept such findings without review. ***The Conservancy's arguments are false and intentionally misleading.***

On page 3 of its motion to strike and page 7 of its demurrer, the Conservancy quotes section 31054 of the Public Resources Code. The Conservancy states "[t]he Legislature explicitly provided

that its intent in forming the Conservancy was to establish 'responsibility for implementing a program of agricultural protection, area restoration, and resource enhancement in the coastal zone." (Motion, p. 3; Demurrer, p. 7). This quote is intentionally misleading, because, had it been presented in full, it would invalidate most of the Conservancy's arguments. Section 31054 of the Public Resources Code actually reads:

> **State policy and intent**
>
> It is the policy of the state and the intent of the Legislature to provide for the State Coastal Conservancy, which should report to the Governor and to the Legislature, with responsibility for implementing a program of agricultural protection, area restoration, and resource enhancement in the coastal zone ***within policies and guidelines established pursuant to Division 20 (commencing with Section 30000)***[the California Coastal Act].

Cal. Pub. Res. Code § 31054. In other words, the state policy and intent of the Legislature in creating the Conservancy was to vest it with ***responsibility*** for ***implementing*** programs in the coastal zone ***within policies and guidelines established by the California Coastal Act.*** Moreover, Public Resources Code section 31104.1, in relevant part, provides:

> The conservancy shall serve as a repository for lands whose reservation is ***required to meet the policies and objectives of the California Coastal Act . . . Pursuant to that authority***, the conservancy may accept dedication of . . . interests in lands, including interests ***required to provide public access to recreation and resources areas in the coastal zone.*** (Emphasis added.)

Cal. Pub. Res. Code § 31104.1. Far from exempting the Conservancy from compliance with the California Coastal Act or making the Conservancy the passive receptacle of the Commission's determinations, according to sections 31104.1 and 31054 the Conservancy is ***independently*** charged with the responsibility of implementing the Coastal Act's guidelines and policies. Moyer v. Workmen's Comp. Appeals Bd., 10 Cal.3d 222, 230 (1973) (statutes should be construed so as to give effect to all of their provisions); Dix v. Superior Court, 53 Cal.3d 442, 459 (1991) (courts should avoid constructions which render statutory language superfluous or unnecessary); Moore v.

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City Council, 244 Cal.App.2d 892, 897 (1966) ("Every word, phrase, or provision is presumed to have a meaning and to perform a useful function").

In fact, in this case while the Commission determined if the ***coastal permits*** for the homes were consistent with the Coastal Act, the Conservancy is charged with the independent duty to determine if the ***dedication*** of the Lot is consistent with the Coastal Act. Thus, the Conservancy is charged with making ***factual findings*** that any proposed dedication for beach access is consistent with, among other Coastal Act mandates, the safety policies of Section 30210 and the resource policies of Section 30214. This makes complete sense, for if the Conservancy were just a passive administrative vehicle for implementing the Commission's decisions, it would not have been created as an independent agency with powers complementary to the Commission – rather it could have been created as a department or sub-division of the Commission.

Thus, the Petitioners could, and have, pled a valid cause of action against the Conservancy under the Coastal Act.

B. Petitioners Have Stated A Valid Cause of Action For Violation of CEQA.

The Conservancy demurs to Petitioners' third cause of action under CEQA on several grounds. The argument that its conduct under CEQA is reviewable only by traditional mandate fails for the reasons set forth above. Again, the Conservancy is trying the merits of the case with the use of evidence not properly before this Court instead of evaluating the allegations of the petition.

The Conservancy's attempt to prove — through the use of the Commission's and Conservancy's staff reports and findings — that there has been no violation of CEQA (Demurrer, pp. 10-11) is utterly inappropriate on demurrer, and should be ignored by the Court in its entirety.

The Conservancy argues that it did not violate CEQA because it was not the lead agency, that it was obligated as a matter of law to defer to the determination by the lead agency (the Commission), and that the Commission's determination was exempt from the procedural requirements of CEQA because its regulatory procedures are considered "functionally equivalent" to those of CEQA. (Demurrer, 10:8-28).

Even if the Conservancy were acting as a responsible agency, which it cannot show at the demurrer stage, the Commission's CEQA review was not determinative for the Conservancy. The

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Conservancy still has responsibility for complying with CEQA to mitigate "the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance or approve." 14 Code of California Regulations ("CCR") 15096(g)(1).

The reliance upon the Commission's "functional equivalent" documents was not contained in the record. Rather, the Conservancy made a finding that its own action (not the Commission's) was categorically exempt. In fact, the use of a certified program environmental document (the Commission's) by a responsible agency (the Conservancy) is subject to the conditions specified in 14 CCR 15253(b). These conditions include consultation with the responsible agency ***prior*** to the release of the environmental document, identification of alternatives and consideration of all significant effects. None of these conditions can be shown to have been met within the context of a demurrer.

The Conservancy also argues that its decision to acquire the Lot was exempt from CEQA review pursuant to certain "categorical exemptions" found in 14 CCR sections 15316, 15317 and 15325. First, section 15316, as admitted in the Conservancy's demurrer, was not even mentioned by the Conservancy as a basis for any CEQA exemptions until it appeared in the Conservancy's demurrer brief. Second, the exemption cannot be used if the land is not in a "natural condition." 14 CCR 15316. Whether the land is in a natural condition is a question of fact which cannot be decided on demurrer. In fact, the Lot is fenced, adjacent to Pacific Coast Highway, and the permit conditions require certain additional improvements be made prior to the dedication. Moreover, the Conservancy accepted the dedication of the Lot in order to undertake the development necessary to make it usable as public beach access, not to keep in a natural condition.

Section 15317 provides a CEQA exemption where land is accepted to maintain its open space character. Again, whether the land is being maintained in an open space character is a question of fact which cannot be decided on demurrer. As mentioned above, the Lot is surrounded by a fence, and the Conservancy accepted the Lot in order to develop public beach, not to keep it as "open space." Finally, section 15325 deals with a CEQA exemption for transfers of land to "preserve" open space. As mentioned above, whether the Conservancy has accepted the land with the intent to maintain the Lot as open space is a question of fact. Moreover, the Conservancy admits in its briefs

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that the Lot will be developed with the facilities necessary to allow public viewing and access, such as stairs and a boardwalk.

Moreover, a determination that a categorical exemption applies is a factual determination. See Fairbank v. City of Mill Valley, 75 Cal.App.4th 1243, 1251 (1999) (determination that categorical exemption applies is a factual question).

Finally, as pled in the Petition, the use of any categorical exemption is subject to the rule of special circumstances. (Petition, ¶ 19). "[W]here there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper." Cal. Pub. Res. Code § 21084; Wildlife Alive v. Chickering, 18 Cal.3d 190, 205-206 (1976); CEQA Guidelines § 15300.2(c). Again, whether such significant effect will occur is a question of fact. Fairbank, 75 Cal.App.4th at 1259.

The Conservancy cannot deprive Petitioners of a trial on their CEQA claim by arguing the evidence on demurrer. The demurrer to the third cause of action should be overruled.

C. Petitioners Have Properly Pled A Cause Of Action For Injunction.

In both its motion to strike and its demurrer, the Conservancy attacks Petitioners' request for the issuance of an injunction, arguing that such relief is not available under mandate and that the Court can only order the agency to act according to law, not substitute its judgment for that of the agency. (Motion, pp. 7-8; Demurrer, pp.12-13).

The Conservancy misses the point of the cause of action for injunction. Petitioners are not (as is the Conservancy on this demurrer) seeking to have the Court finally adjudicate the merits in advance of a trial on the petition: they are seeking a provisional remedy to insure that effective relief is not made impossible before a trial on the petition can even be held. It is for precisely this reason that requests for provisional relief are properly included in a petition for writ of mandate. See CCP §§ 1094.5(g), 1094.5(h)(1) (administrative mandate); CCP §§ 1087, 1088 (traditional mandate). Courts have long accepted that initial pleadings may contain requests for provisional relief (such as injunctions) in the form of causes of action. See United Food and Commercial Workers Union, Local 324 v. Superior Court, 99 Cal.Rptr.2d 849, 852 and n.4 (Aug. 30, 2000) (plaintiff's verified complaint for temporary restraining order, preliminary and permanent injunction and damages was

granted as to provisional remedies); In re Engelbrecht, 67 Cal.App.4th 486, 489 (1998) (district attorney filed complaint for temporary restraining order and permanent injunction to abate public nuisance).

Prohibitory injunctions such as that sought by Petitioners here, forbidding the Conservancy from opening public access until the Court has reviewed the Conservancy's action to see if it complies with law, are entirely proper. CCP §§ 525 , 526, 1087, 1088, 1094.5(g), 1094.5(h)(1). The motion should be denied, and the demurrer overruled, as to the fourth cause of action.

V. CONCLUSION

For all of the foregoing reasons, the Conservancy's motion to strike should be denied and its demurrer should be overruled. The Conservancy should be ordered to prepare an administrative record and answer the petition.

Dated: September 25, 2000

Patricia L. Glaser
Clare Bronowski
CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP

By: _____
CLARE BRONOWSKI
Attorneys for Petitioners

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 2121 Avenue of the Stars, Eighteenth Floor, Los Angeles, California 90067.

On September 25, 2000, I served the foregoing document(s) described as:

Petitioners' Consolidated Opposition Brief to Respondent's Motion to Strike and Demurrer

on the interested parties to this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

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Executed this 25th day of September, 2000, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

GERRI LEDESMA

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FROM: David J. Altman

DATE: September 25, 2000

Client Reference No.: 03749-001

TO:	FAX NO.:	CONFIRMATION NO.:
Patricia Sheehan Peterson Department of Justice	(510) 622-2270	(510) 622-2100

Sender's Comments:

Petitioners' Objection ot Respondent's First Request for Judicial Notice; Petitioners' Consolidated Opposition Brief to Respondent's Motion to Strike and Demurrer

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LA COSTA BEACH HOMEOWNERS' ASSOCIATION, a California Corporation, RICHARD ZIMAN, an individual, DAPHNA ZIMAN, an individual, ART ZOLOTH, an individual, HELEN ZOLOTH, an individual, FREDDIE FIELDS, an individual, CORINNA FIELDS, an individual, PEG YORKIN, an individual, BUDGE OFFER, an individual, JERRY MONKARSH, an individual, VIRGINIA MANCINI, an individual, RYAN O'NEAL, an individual, AARON SPELLING, an individual, CANDY SPELLING, an individual, NANCY HAYES, an individual, and LOU ADLER, an individual,

Petitioners,

v.

CALIFORNIA STATE COASTAL CONSERVANCY, a California state agency, and DOES 1 through 50, inclusive,

Respondents.

GAMMA FAMILY TRUST, BROAD REVOCABLE TRUST and NANCY M. DALY LIVING TRUST,

Real Parties-in-Interest.

Case No. BS063275

PETITIONERS' OBJECTION TO RESPONDENT'S FIRST REQUEST FOR JUDICIAL NOTICE

[The Honorable Dzintra Janavs]

Date: October 5, 2000
Time: 9:30 a.m.
Department: 85

[Filed concurrently with Petitioners' Consolidated Opposition Brief to Respondent's Motion to Strike and Demurrer]

In support of its motion to strike and demurrer, Respondent California State Coastal Conservancy ("the Conservancy") requests that this Court take judicial notice of (1) the Staff Report of the California Coastal Commission dated March 28, 2000; (2) the Conservancy Project Summary for Carbon/La Costa Beach Public Access Dedication dated April 27, 2000; and (3) a letter from Linda Locklin, Manager of Coastal Access Program, California Coastal Commission to Marc Beyeler, of the Conservancy, dated April 25, 2000.

Petitioners hereby object to the Conservancy's request for judicial notice. The request should be denied in its entirety because the Conservancy seeks judicial notice not of the documents' existence but of their truth and substance — a flagrant misuse of the judicial notice process at any time, and especially improper at the pleading stage of a case.

On demurrer, a court may take judicial notice of the existence of a document, but it may not "judicially notice" the truthfulness, substance, or proper interpretation of the contents of the document. AL Holding Co. v. O'Brien & Hicks, Inc., 75 Cal.App.4th 1310, 1312 (1999), citing StorMedia Inc. v. Superior Court, 20 Cal.4th 449, 457, fn. 9 (1999); see also Bach v. McNelis, 207 Cal.App.3d 852, 864-65 (1989). Regardless of whether reports are created in an official or governmental capacity, the substance of those reports cannot be judicially noticed for their truth. People v. Jones, 15 Cal.4th 119, 172 n.17 (1997) (Supreme Court would not judicially notice truth or accuracy of entry in police report as police report is reasonably subject to dispute), overruled on other grounds by People v. Hill, 17 Cal.4th 800, n.1 (1998).

Yet that is precisely what Respondent seeks to do in this case. See Demurrer, p. 11; Motion to Strike, pp. 5-6. As set forth in Petitioners' Opposition, filed concurrently herewith, the Conservancy is improperly attempting to determine the merits of the case at the pleading stage, short circuiting Petitioners' right to a fully contested trial on their claims. This cannot be permitted.

None of the Conservancy's cases support its attempted use of the staff report and other cited documents. To the contrary, every one of them supports Petitioners' position that a court may judicially notice only a document's existence (or in these cases, its absence), but not the alleged truth of its contents. For example, in Smith v. Ricker, 226 Cal.App.2d 96, 99 (1964), the issue was

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whether the government had abandoned a particular portion of highway; the court took judicial notice of a resolution relocating a highway and a map showing the relocation merely to establish the absence of any formal declaration of abandonment. 226 Cal.App.2d at 101. (Moreover, the finding that there had been abandonment rested not on the judicially noticed documents but on separate, substantial evidence of the intent to abandon. Id.) Likewise, in Adoption of McDonnell, 77 Cal.App.2d 805, 812 (1947), the court took judicial notice of the agency's files only to establish the absence of any recorded consent by the birth parents to the contested adoption.

Post v. Pratti, 90 Cal.App.3d 626, 634-5 (1979), is even further afield. There, the plaintiff conceded the court's ability to judicially notice committee reports, excerpts of public testimony, and correspondence relating to a Senate bill, challenging only the relevance of the material to the constitutionality of the Public Resources Code section under attack. Furthermore, the Post court stressed that the question of statutory interpretation before it was one of law (id) and, thus, appropriate for decision on demurrer. In sharp contrast, as set forth in Petitioners' Opposition, the issues before this Court are ones of fact that cannot be decided as a matter of law on demurrer, with or without the documents that the Conservancy improperly requests the Court to judicially notice.

For all of the foregoing reasons, the Conservancy's first request for judicial notice should be denied.

Dated: September 25, 2000

Patricia L. Glaser
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By: _____
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